Nos. 14483-84

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

GEORGE C. WICKS, *Plaintiff and Appellant*

v.

SOUTHERN PACIFIC COMPANY (PACIFIC LINES), *Defendant and Appellee*

BROTHERHOOD OF MAINTENANCE OF WAY EMPLOYEES, *Intervenor and Appellee*

PHILIP F. JENSEN, *Plaintiff and Appellant*

v.

UNION PACIFIC RAILROAD COMPANY, a Corporation, *Defendant and Appellee*

BROTHERHOOD OF RAILWAY AND STEAMSHIP CLERKS, FREIGHT HANDLERS, EXPRESS AND STATION EMPLOYEES, *Intervenor and Appellee.*

On Appeal From Final Order Denying Injunction and Granting Summary Judgment and Dismissal

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BRIEF OF INTERVENORS-APPELLEES

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Dated at Washington, D. C.
July 11, 1955.

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BRIEF OF INTERVENORS-APPELLEES

PRELIMINARY STATEMENT

This is an appeal from a final judgment of the United States District Court for the Southern District of California, Central Division, denying Plaintiffs'-Appellants' application for injunctive relief, vacating a temporary

restraining order, and granting Intervenors'-Appellees motion for summary judgment and dismissing the actio (R. 90).

Pursuant to stipulation of the parties, this Court ordere on February 18, 1955 that because the appeals in both th Wicks and Jensen cases presented identical questions o law arising out of ultimate facts identical in nature,[1] tha one printed record be filed, one oral argument be hear and the parties file separate or consolidated briefs (F 3, 5). Pursuant to said order this brief is filed jointly o behalf of the two railroad labor organizations who wer intervening Defendants in the court below and are Appe lees here.[2]

Because in our view Appellants do not accurately repre sent to this Court the true nature of the judgment belo and the real questions presented by this appeal, nor do the adequately present the facts and pleadings, we feel tha a restatement of the case is required.

RESTATEMENT OF THE FACTS AND PLEADINGS

In the action below Appellants sought to enjoin th defendant Railroads from terminating their employmen pursuant to provisions of union shop agreements betwee the defendant Railroads and the intervening Defendan labor organizations[3] on the ground that said agreement and the provisions of the Railway Labor Act under whic they were made were unconstitutional and void (R. 55, 64)

The material facts as disclosed by the amended com plaint in the Jensen case (R. 55) and the affidavit attache

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[1] The few minor factual differences between the Wicks and Jensen case none of which are of substance, are set forth in the Transcript of Recor pages 104-107.

[2] Also pursuant to this stipulation only the record in the Jensen case wa printed.

[3] For convenience and brevity the defendants Union Pacific Railroad an Southern Pacific Company will be referred to herein as the Railroads and th intervening appellee labor organizations as the Brotherhoods.

to the Brotherhoods' motion for summary judgment (R. 21) are undisputed. A brief summary of these facts follows:

On March 7, 1953, defendant Union Pacific Railroad and the Brotherhood of Railway and Steamship Clerks, together with other railroad labor organizations representing non-operating employees, entered into a union shop agreement which became effective on March 31, 1953. A copy of this agreement is set forth in the Transcript of Record as Exhibit B to the Brotherhoods' affidavit (R. 36). The union shop agreement was made pursuant to express provision contained in Section 2 Eleventh of the Railway Labor Act, as amended on January 10, 1951 (45 U.S.C.A. Sec. 152 Eleventh).[4]

At the time the union shop agreement was made and on its effective date, Appellant Jensen was employed by the defendant Railroad in a clerical position in the craft or class for which the Brotherhood is the duly designated and authorized collective bargaining representative under the Railway Labor Act.

The union shop agreement provides in part that, subject to certain terms and conditions, all employees as a condition of their continued employment shall "become members of the organization party to this agreement representing their craft or class within sixty calendar days of the date they first perform compensated service as such employes after the effective date of this agreement, and thereafter shall maintain membership in such organization; . . ." (R. 36).

On the same date that the union shop agreement was executed, the Brotherhood and the Railroad entered into another agreement known as a Memorandum Agreement, also effective on March 31, 1953, and set forth in the Record as Exhibit C to the Brotherhoods' affidavit (R. 48). This Memorandum Agreement provides that any employee in

[4] The pertinent provisions of Section 2 Eleventh will be set forth *infra* under the Statement of the Statute Involved.

the service on the date of the said agreement who is not a member of the union representing his craft or class, and who will make affidavit that he was a member as of the date of the agreement of a bona fide and recognized religious group having scruples against joining a union, will be relieved of the obligation to join the Brotherhood and execute the oath of membership, and will be deemed to have met the requirements of the union shop agreement by the payment of an amount equivalent to the initiation fees, periodic dues, and assessments required for membership by the organization representing his craft or class. As stated in the Brotherhoods' affidavit (R. 23) and as admitted in the amended complaint (R. 59), Appellant failed and refused to comply with either the terms of the union shop agreement or the Memorandum Agreement, assigning as his reason therefor religious beliefs incompatible with their requirements.

Pursuant to the provisions of the union shop agreement the Brotherhood notified the railroad of the Appellant's non-compliance and requested the termination of his employment. Appellant was granted a hearing and all appeal procedures provided by Section 5 of the agreement (R. 38-42), the final step of which was a decision of a neutral arbitrator appointed by the National Mediation Board. This decision was rendered on January 27, 1954, by Arbitrator Edgar L. Warren who found that Appellant had not complied with the terms of the union shop agreement and held that in accordance with its requirements Appellant's seniority and employment would be terminated within ten days from the arbitrator's decision. A copy of the opinion and award of the arbitrator is set forth in the Transcript of Record as Exhibit A to the Brotherhoods' affidavit (R. 25-35). On February 2, 1954, the Railroad notified Appellant that effective February 5, 1954 his employment would be terminated (R. 60), whereupon the action was instituted by the filing of a complaint in the District Court (R. 6).

A motion for summary judgment was filed (R. 20) to which affidavits and exhibits were attached (R. 21-50) upon which comment has been made above. In support of the motion for summary judgment the Brotherhood took the position that if the action could be deemed to present a substantial federal question it was one upon which hearing and determination by a three-judge court was required, but if the claim was insubstantial and lacking in merit, as contended by the Brotherhood, it was subject to dismissal by a single judge.

The Railroad filed an answer to the complaint in which it denied the allegations of unlawfulness and illegality and requested dismissal of the action (R. 66-71).

OPINION BELOW

On May 26, 1954, District Judge Ben Harrison filed a written opinion (R. 74-81) in which he concluded that there was no substantial constitutional question presented requiring a three-judge court and determined that the applications for injunctive relief should be denied, the temporary restraining order vacated, and the motions for summary judgment granted. 121 F. Supp. 454. Pursuant to this opinion, findings of fact and conclusions of law, as amended (R. 81-89), together with a judgment of dismissal (R. 90-91), were entered on June 10, 1954.

RESTATEMENT OF JURISDICTION

Although Appellants state in their brief (p. 1) that this Court has jurisdiction of the appeal by virtue of Section 1292, Title 28 U.S.C.A., authorizing appeals from interlocutory orders of district courts, we believe the nature of the judgment below is such that jurisdiction is properly predicated upon Section 1291 of Title 28, U.S.C.A. which establishes jurisdiction in the Court of Appeals of all final decisions of district courts.

RESTATEMENT OF QUESTIONS INVOLVED

Appellants' statement of the questions presented on this appeal (p. 5) is so worded as to imply that this Court is called upon to pass upon the constitutional questions which Appellants sought to litigate below. This is confirmed at another point in Appellants' brief (p. 23) where discussion of a contention and quotation from a decision is followed by the statement that "this court must pass upon the constitutional questions raised."

Such a presentation of the questions involved misconceives the opinion and judgment below as well as the jurisdiction which this Court can exercise on this appeal. The review here permitted by statute is confined to a determination of whether the District Court was correct in concluding that the constitutional questions sought to be raised were so insubstantial as not to warrant the establishment of a three-judge court.[5] If this Court agrees with that judgment it may affirm, but if it disagrees it does not possess the jurisdiction to do more than remand the case with directions to convene a three-judge court to consider the constitutional questions presented. Any injunction based upon the alleged unconstitutionality of the union shop amendment to the Railway Labor Act would enjoin the "operation" of an Act of Congress for repugnance of the Constitution of the United States, and, as such, would be subject to the requirements of Title 28 U.S.C.A., Sections 2282 and 2284. *Coffman* v. *Breeze Corporations, Inc.*, 323 U.S. 316, 317 n. 1.

For these reasons, we think a proper statement of the questions involved on this appeal is as follows:

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[5] Appellant not only applied for a three-judge court (R. 65) which the District Court denied (R. 81, 88), but he also notified the United States Attorney General (R. 103) of his challenge to the constitutionality of the union shop amendment to the Railway Labor Act, as required by statute. The disinclination of the Attorney General to intervene in this proceeding upon reading the opinion below and transcript of record can only be attributed to his conclusion that Appellants' contentions are either frivolous or clearly insubstantial.

1. Whether the District Court was correct in holding that the claim that the union shop amendment to the Railway Labor Act and the union shop agreement made pursuant thereto are unconstitutional fails to present a substantial federal question and is therefore subject to dismissal by a single judge?

2. Assuming, *arguendo,* that the claim of unconstitutionality presents a substantial federal question, whether the action is subject to hearing and determination only by a statutory three-judge court?

STATUTE INVOLVED

Section 2 Eleventh of the Railway Labor Act, which was added by a 1951 amendment (45 U.S.C.A. 152 Eleventh), in pertinent part provides as follows:

> "Eleventh. Notwithstanding any other provisions of this Act, or of any other statute or law of the United States, or Territory thereof, or of any State, any carrier or carriers as defined in this Act and a labor organization or labor organizations duly designated and authorized to represent employees in accordance with the requirements of this Act shall be permitted—
>
> "(a) to make agreements, requiring, as a condition of continued employment, that within sixty days following the beginning of such employment, or the effective date of such agreements, whichever is the later, all employees shall become members of the labor organization representing their craft or class: *Provided,* That no such agreement shall require such condition of employment with respect to employees to whom membership is not available upon the same terms and conditions as are generally applicable to any other member or with respect to employees to whom membership was denied or terminated for any reason other than the failure of the employee to tender the periodic dues, initiation fees, and assessments (not including fines and penalties) uniformly required as a condition of acquiring or retaining membership.
>
> * * *

"(d) Any provisions in paragraphs Fourth and Fifth of Section 2 of this Act in conflict herewith are to the extent of such conflict amended." Railway Labor Act, Section 2 Eleventh; 64 Stat. 1238, U.S.C. Title 45, Section 152 Eleventh.)

ARGUMENT

I.

The Asserted Unconstitutionality of the Union Shop Amendment to the Railway Labor Act and the Union Shop Agreement Is Obviously Without Merit, and the District Court Was Clearly Correct in Dismissing the Complaints for Failure to Present a Substantial Federal Question.

At the outset of this Argument it should be noted that although the Court below filed a written opinion (R. 74) 121 F. Supp. 454, which carefully considered and answered each of the contentions urged by Appellants in this Court, no mention or discussion of that Opinion is made by Appellants in their brief. Moreover, there is likewise no mention nor discussion of the decision of the U.S. Court of Appeals for the Second Circuit in *Otten* v. *Baltimore & Ohio R. Co.,* 205 F. 2d 58, in which case identical issues to those here presented were decided adversely to Appellants.

The sole ground upon which the complaints filed in the District Court sought to enjoin Appellee Railroads from terminating Appellants' employment was the alleged unconstitutionality of the Union Shop Amendment to the Railway Labor Act (45 U.S.C.A. Sec. 152 Eleventh) and the union shop agreement made pursuant thereto. (R. 36) As set forth above in our Statement of the Facts and Pleadings, the complaint sought the issuance of injunctions, preliminary and permanent, enjoining the termination of Appellants' employment and seniority because of such alleged unconstitutionality. Although, as we shall later show, federal law requires hearing and determination

by a statutory three-judge court before such relief may be granted, it is well established by decisions of the Supreme Court of the United States that it is the duty of a single District Court judge first to determine whether the constitutional issue sought to be presented is substantial before invoking the three-judge court procedure. If the constitutional issue is determined not to present a substantial federal question a single district judge may deny the relief sought. Such unconstitutionality may be apparent because the asserted unconstitutionality is either "frivolous" or "obviously without merit". *William Jameson & Co.* v. *Morganthau,* 307 U.S. 171; *California Water Service Co.* v. *The City of Reading,* 304 U.S. 252; *Ex Parte Poresky,* 290 U.S. 30.

The District Court adopted this view when it held as a matter of law (R. 88) that since the allegations of Plaintiffs' amended complaint failed to present any substantial ground for granting the injunctive relief requested, the statutory three-judge court procedure was not applicable. In so holding Judge Harrison relied in his opinion (R. 77, 87) on an identical determination in an opinion by Judge Learned Hand of the United States Court of Appeals for the Second Circuit in *Otten* v. *Baltimore & Ohio R. Co.,* 205 F. 2d 58.

It is our position that an analysis of the allegations of the amended complaint (R. 55-65) and of the statutory and constitutional provisions invoked clearly shows that the constitutional questions raised are entirely lacking in substance. The action of the Appellee Railroads which Appellants seek to have enjoined is the operation and performance of agreements between the Railroads and the Brotherhoods. Examination of the statutory provisions which expressly authorize such agreements plainly discloses the lack of merit in the asserted unconstitutionality. Prior to 1951 Section 2 Fifth of the Railway Labor Act (45

U.S.C.A. Section 152 Fifth) prohibited union shop agree ments. By Section 2 Eleventh, enacted in 1951, this prohibi tion was repealed so that union shop agreements may nov be made in the railroad industry within limitations pre scribed by the Statute. Consequently Appellants' conten tion that the Union Shop Amendment is unconstitutiona amounts to no more than a claim that they have a constitu tional right to have Congress continue to prohibit suc agreements. Such a claim is clearly without substance o merit. This was the precise holding of the United State Court of Appeals for the Second Circuit, in *Otten* v. *Balti more & Ohio R. Co.,* 205 F. 2d 58 decided on June 8, 195 In that case, the facts of which are almost identical to thos here presented, Judge Learned Hand reasoned that th enactment of the Union Shop Amendment to the Railwa Labor Act amounted to a repeal of the pre-existing pro hibition of union shop agreements in Section 2 Fifth, an that "there can be no plausible argument that to repea such a statute was unconstitutional" (p. 60). Judge Har rison expressly agreed with and adopted this holding i the Opinion filed below (R. 78).

It is true that Judge Hand went on to say that th Union Shop Amendment in 1951 might be said to hav affirmatively legalized union shop agreements if the were invalid at common law, and that under such cir cumstances a challenge to the constitutionality of th amendment might not be considered "insubstantial" However, he further reasoned that such a possibility wa not involved so far as the State of New York was con cerned because of the fact that union shop agreement were valid under the common law of New York. A Judge Harrison points out in the Opinion of the Distric Court (R. 77) there is likewise no prohibition at commo law in California of union shop agreements. *Colgat Palmolive-Peet Co.* v. *National L.R. Bd.,* 338 U.S. 355, 361

J. F. Parkinson Co. v. *Building Trades Council,* 154 Cal. 581, 98 Pac. 1027; *Schafer* v. *Registered Pharmacists Union,* 16 Cal. 2d 379, 106 P. 2d 403; *James V. Marinship Corp.,* 25 Cal. 2d 721, 155 P. 2d 329.

Accordingly the decision of the District Court here, as in the *Otten* case, was clearly correct in holding that the asserted unconstitutionality of the federal law is obviously without merit because there is no common law prohibition of union shop agreements in California which the federal law can be said to supersede,[6] even though it is quite clear on the face of the statute that any such law, if it existed, has been superseded.

We submit that the foregoing is a sufficient answer to the contentions advanced by Appellants in the first six sections of their argument to this Court (Appellants' Br. pp. 6-18) with respect to the asserted unconstitutionality of the Union Shop Amendment to the Railway Labor Act.

In the last section of their argument (Appellants' Br. pp. 19-26) Appellants attempt to show that the union shop agreements, as distinguished from the statutory provisions authorizing them, are unconstitutional on the theory that they involve "Government Action". This contention is as untenable as the asserted unconstitutionality of the Statute itself. The Federal Constitution does not confer upon an individual any right to employment. In the absence of statutory or contractual restrictions, an employer is free to terminate an employee's services for any reason since he has an undisputed right at common law to hire and dis-

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[6] In this connection Judge Harrison pointed out in his Opinion for the District Court (R. 77-78) that certain holdings of the state courts in Texas and Nebraska to the effect that the Union Shop Amendment to the Railway Labor Act was beyond the legislative power of Congress have not been overlooked but that he was not in accord with the views stated in those decisions because "of the difference in the laws of the states involved, assuming that the state laws can control an act of Congress in this field".

charge at will. Constitutional guarantees of individual freedom of religion, due process, and the like are directed exclusively to preventing infringement by the Government. It is too well established to require extended discussion that such constitutional rights have nothing to do with limitations which may be imposed on personal freedom by action of employers or as a result of contracts between private parties. *Corrigan* v. *Buckley,* 271 U.S. 323, 330; *Shelley* v. *Kraemer,* 334 U.S. 1, 9; *Public Utilities Commission* v. *Pollak,* 343 U.S. 451, 461-462; *Denicke* v. *Brigham,* 142 F. 2d 221, 224, and cases cited therein, fn. 9 (9th Cir.).

In an obvious effort to avoid the well established law of these decisions, Appellants seek to establish that the actions of the Brotherhoods in making union shop agreements with the Railroads "are, in legal effect, actions of the Federal government." In short it seems to be Appellants' contention that the Brotherhoods are exercising delegated legislative authority when they contract with Railroads for a Union Shop. In support of this contention the Appellants rely exclusively upon isolated quotations from the decisions of the Supreme Court in *American Communications Asso.* v. *Douds,* 339 U.S. 382 (a non-Communist Affidavit case) and *Steele* v. *Louisville & Nashville R. Co.,* 323 U.S. 192, together with certain quotations from the legislative history of the Union Shop Amendment.

The statements from the legislative history quoted by Appellants (pp. 24-25) are designed to show that it was the intention of the Unions, if they were successful in obtaining legislation authorizing a Union Shop in the railroad industry, to press vigorously for the adoption of agreements on a national basis. We readily concede that such was the Unions' objective and that it has been successful. But we fail to see any possible basis for Appellants' conclusion that by virtue of this objective and its fulfillment the Unions are exercising delegated legislative power.

Appellants' reliance upon certain quotations from the *Douds* and *Steele* cases is similarly specious. In the *Steele* case the Supreme Court held that a union organization chosen under the Railway Labor Act to represent the employees of a given craft or class had the obligation in collective bargaining and in making contacts with a carrier to represent *all* members of the craft without hostile discrimination because of race or color. The Court held this obligation to arise from the Statute itself as an implied condition of the congressional grant of authority to represent a craft and to make contracts as to the wages, hours, and working conditions of its members. 323 U.S. 192, 203-204.

In the course of its opinion, the Court pointed out (p. 202) that while the majority of the craft chooses the bargaining representative, the Railway Labor Act requires by its terms that all of the craft—not simply the majority—are to be fairly represented. The Court likened the obligation thus created by Statute to the duty which the Constitution of the United States imposes upon a legislature to give equal protection to the interests of those for whom it legislates. It reasoned (p. 198) that to interpret the Railway Labor Act as empowering a bargaining representative to discriminate arbitrarily against negro members of the craft would raise constitutional objections not otherwise involved. But the Court then proceeded to state that the constitutional questions did not arise because of its conclusion that the Railway Labor Act itself not only authorized a labor union chosen by a majority to represent the entire craft, but also imposed a corresponding obligation to protect the rights of the minority of the craft (p. 199).

These references in the Court's opinion to the Constitution and the analogies made by the Court to the obligations of a legislature to give equal protection to the interests of

all for whom it legislates are seized upon by Appellan as establishing the proposition that the Brotherhoods a necessarily exercising delegated legislative power whe they make union shop agreements pursuant to the autho ity contained in Section 2 Eleventh of the Railway Labo Act. Such a conclusion is a complete *non sequitur* fo several reasons.

It is one thing to say that the authority derived fro statute by a union chosen by a majority to represent mino ity as well as majority is not unlike the authority of a le islature in terms of the obligation imposed upon both t treat fairly all those for whom it acts. It is quite anothe thing to say that the bargaining representative thereby b comes the alter ego of the Congress when it enters into a agreement with an employer. The Supreme Court said n such thing in the *Steele* case. It simply said that an u restricted grant of authority to a representative chosen b a majority arbitrarily to ignore or obliterate the righ of a minority would raise constitutional objections to th authority thus granted. It did not say that the action o the representative in making contracts with the carrier wit respect to rates of pay, rules or working condition amounted to the exercise of delegated legislative authority Similarily, if the Union Shop Amendment to the Railwa Labor Act authorized bargaining representatives wh would arbitrarily exclude negroes from membership t make union shop agreements which at the same time woul require the termination of the employment of the exclude employees for failure to obtain membership, constitutiona objections to the authority thus granted would be raise But the simple act of a union making an agreement with carrier is nonetheless the action of private parties an does not amount to the exercise of delegated legislativ power.

In short it is the legislative creation of the right which s subject to constitutional requirements—not the manner f its exercise. If the legislatively created right is con- titutional, excesses in its exercise are subject to the re- trictions of the statute. This very reasoning was applied y the Supreme Court in its decision in the *Steele* case.

Similarly, in the *Douds* case Appellants stop too short hen they quote (Br. p. 21) from the Court's Opinion (p. 01) that "when authority derives in part from Govern- nent's thumb on the scales the exercise of that power by rivate persons becomes closely akin, in some respects, to ts exercise by government itself." The Court very care- ully restricted any such inference as Appellant seeks to raw when it went on to state in the very next sentence im- ediately following that quoted by Appellants (p. 402):

> "We do not suggest that labor unions which utilize the facilities of the National Labor Relations Board *become Government agencies or may be regulated as such.* But it is plain that when Congress clothes the bargaining representative 'with powers comparable to those possessed by legislative body both to create and restrict the rights of those whom it represents,' [citing *Steele* v. *Louisville & Nashville R. Co.*] the public in- terest in the good faith exercise of that power is very great". (Italics supplied)

We think it is well established that when Congress ndertakes to regulate collective bargaining in interstate ommerce by prescribing procedures for the conduct of uch bargaining providing merely for the regulation of isputes, and imposing upon carrier and employees the bligation to bargain with each other, it is not delegating egislative power. The legislative power has been fully xercised. It seems to us frivolous to suggest that bar- aining between railroad unions and the carriers with espect to rates of pay, rules or working conditions in erms of whether wages should be increased or reduced, or hether longer or shorter hours should be sought, involves

the exercise of legislative power. The making of a union shop agreement is in exactly the same category. Subject to such restrictions as Congress may have imposed by its legislation, the action of employers and employees in negotiating conditions of their employment constitutes simply the exercise of the basic right of private parties to contract. This is true whether the contractual authority is exercised by a collective representative or left to individuals, or whether the subject matter of the contract is wages, hours, a union shop, or any other condition of employment.

For these reasons we submit that the union shop agreement here involved is a contract between private parties and as such can not violate constitutional rights of individual freedom of religion, due process, and the like, which are guarantees exclusively against infringement by the Government.

Consistent with the argument above advanced in Answer to Appellants' reliance upon the *Steele* and *Douds* decisions is a similar rejection by Judge Learned Hand in the *Otten* decision. In that case, as here, Plaintiff was a member of the "Plymouth Brethren" religious group. In referring to the requirements of the union shop agreement on the Baltimore & Ohio Railroad, Judge Hand pointed out (205 F. 2d 58 at 61) that the Union had not excluded the plaintiff but, on the contrary, had "made substantial concessions to induce him to join". For this reason he found the Supreme Court's decision in the *Steele* case, where Steele had been excluded, to be totally inapplicable. He also stressed the fact that the sanctions being imposed were not political or governmental in nature. He added (p. 61):

> "The First Amendment protects one *against action by the Government,* though even then, not in all circumstances; [citing *Reynolds* v. *U.S.*, 98 U.S. 145] but it gives no one the right to insist that in the pursuit of their own interests others must conform their conduct to his own religious necessities." (Italics supplied)

The terms of the union shop agreement here involved, f strictly adhered to, would have required Appellants to join the Brotherhoods and execute the oath of membership as a condition of their continued employment. However, the Brotherhoods did not see fit to enforce strict adherence to the terms of the Agreement in connection with those who hold bona fide religious beliefs incompatible with such membership. In an effort to make it possible for Appellants and others like them to continue in employment without offending their religious scruples, the Brotherhoods sought to make special arrangements for them. They did not feel that they could, in fairness to all other employees in the crafts which they represented who were required by the union shop agreement to assume all the obligations of membership, wholly exempt Appellants from all obligations. As shown by the Exhibit attached to the Brotherhoods' affidavit set forth as Exhibit C in the Transcript of Record (R. 48), Appellants and other members of bona fide religious sects holding similar views were exempt from all requirements of membership except the payment of amounts equivalent to initiation fees, dues and assessments. In short, all Appellants were required to do—which the Brotherhoods did not feel was incompatible with their religious beliefs—was to share with their fellow employees the costs of providing representation for all members of the crafts. With specific reference to this phase of the case, and by way of additional answer to Appellants' argument even assuming the presence of congressional action as contended in the last section of Appellants' brief, Judge Harrison had the following to say in the opinion below: (R. 78-79)

> "Assuming by way of argument that there were congressional action present here, still the protection of the First Amendment could not be validly invoked by these plaintiffs. That amendment protects against prohibitions. This feature of the case is similar to a case recently decided by the Court of Appeals for the Seventh Circuit. [*Mitchell* v. *Pilgrim Holiness Church*

Corp., 210 F. 2d 879 (1954); (cert. applied for 22 Law Week 3296).][7] In that case a group engaged in religious work claimed to be exempt from the coverage of the Fair Labor Standards Act on the ground that to subject it to the Act would be to prohibit the free exercise of religion. This claim was rejected, the Court saying: 'We think that all of the above cases on which the Defendant relies [cases in fact involving prohibitions on the free exercise of religion] are distinguishable from the instant case. The Act does not in this case prohibit the free exercise of religion. * * * ' Nor can it be said that the plaintiffs' right to worship as they see fit has been prohibited or restricted before this court."

II.

Assuming, Arguendo, That the Claim of Unconstitutionality Presents a Substantial Federal Question, Hearing and Determination Only by a Statutory Three-Judge Court Is Required.

If, as we have previously indicated in our restatement of the case, this Court should regard the constitutional questions raised as substantial, hearing and determination before a three-judge court is required. We do not consider this point to be disputed by Appellants in view of their application below for a three-judge court (R. 65), and we raise it simply because of the fact that in their brief Appellants appear to be asking this court affirmatively to pass upon the merits of their contentions that the Union Shop Amendment to the Railway Labor Act and the agreements made pursuant thereto infringe constitutional rights. In any event it is clear that such consideration is subject to the requirements of Sections 2282 and 2284 of Title 28 U. S. Code, because an injunction based upon the alleged unconstitutionality of the Union Shop Amendment would enjoin the "operation" of an Act of Congress as repugnant to the Constitution of the United States, *Coffman v. Breeze Corporations Inc.*, 323 U. S. 316, 317, n. 1.

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[7] On June 7, 1954, the United States Supreme Court denied certiorari 347 U.S. 1013, 98 L. Ed. 1136.

CONCLUSION

For the foregoing reasons we respectfully submit that the judgment below should be affirmed.

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